REPORT ON A BOOK BY MR. THEODORE SEDGWICK, FROM *Séances et travaux de l'Académie des sciences morales and politiques,* JULY–SEPTEMBER 1858

I am honored to lay before the Academy on behalf of the author a book entitled *A Treatise on the Rules Which Govern the Interpretation and the Application of Statutory and Constitutional Law.*[82] This is the work of Mr. Theodore Sedgwick, one of the most distinguished lawyers in the city of New York, where he also serves as a high judicial officer of the federal government.

I take the liberty of commending this book to the special attention of the Academy. It is worthy of such a recommendation on several grounds. As a treatise on jurisprudence, it has great merit. The author demonstrates a profound knowledge of his subject. His perspicacious, vigorous, and sober mind has enabled him to discern the central argument and crucial authority touching each point, so that he is able to enlighten the reader without overburdening him. His invariably clear and straightforward style leads easily from the word to the idea.

Mr. Sedgwick's treatise cannot fail, therefore, to facilitate the study of American law, yet it is even more essential to readers concerned with the general science of law and with the relation between justice and the government of so-

81. The *Liberty Bell* was an annual publication produced by the Female Anti-Slavery Society of Boston between 1839 and 1858. Tocqueville gave his testimony at the request of Maria Weston Chapman (1806–1885), a founder of the society.

82. This book was first published in New York in 1857. In 1858, Sedgwick was named district attorney for southern New York.

ciety. On this point [it is worth pausing] to recall certain facts that will facilitate the explanation that is to follow.

In a modern society the proper functions of justice are two: to apply the law when it is clear and to interpret it when it is obscure. When a judge finds that the language of the law admits of two meanings, he has the right to choose the one that seems most probable to him. But when the legislature's meaning is unambiguous, the judge has no choice but to respect its will scrupulously.

That is the way things are everywhere in Europe. They are different in America, where the judicial power enjoys the uncontested exercise of prerogatives that, unless I am mistaken, are not yet *granted* to it anywhere else.

The American judge not only applies and interprets the law but also has the power in certain cases to judge the law itself and, after determining that its meaning is clear, nevertheless to declare that it is null and void.

This singular legislation has existed in the United States for more than sixty years. It is not based on a legal text but is rather a product of custom. No constitution formally granted the courts such great power. They attributed it to themselves; no one called for it. Public opinion approved what judges did, and lawmakers, though themselves representatives of popular sovereignty and duly elected under universal suffrage and in full liberty, gave in without a murmur. No principle seems to me less openly admitted in America today and yet more frequently applied than this one.

Mr. Sedgwick shows very clearly the sources from which American courts drew this exceptional power and explains how they exercise it.

The Academy knows that each of the states that make up the American Union has a constitution of its own, a constitution freely debated and voted on by the people of that state and therefore undeniably a product of the people's will.

The American Union also has a special constitution that the American people as a whole adopted when their revolution ended as ours was beginning.

Each of these constitutions imposes obligations not only on ordinary citizens but also on all who govern in the people's name, officials as well as legislators.

It was on this principle that judges drew in claiming the power to set limits to the law itself.

The people, they said, stand above the legislature, just as they do here. Although legislators may claim to speak in the people's name, it is not lawful for them to violate the general rules that the people themselves have laid down in the Constitution. Consequently, a judge need not hesitate to invalidate a law that he deems unconstitutional.

A few examples will help to clarify the way in which this extraordinary jurisprudence works. The constitution of the state of New York (which I choose at random, for all American constitutions contain similar provisions)—to repeat, the constitution of the state of New York states that no accused can be deprived of the right to trial by jury or the guarantees of standard criminal procedure.

Suppose the legislature of the state of New York passed a law that denied the right to be judged by a jury to a certain class of criminals or subjected that class to a special procedure or placed the accused in the custody of authorities other than the courts. Defendants who stood to suffer from the enforcement of such a law could petition the state tribunal, which would have not only the right but also the duty to hear their case.

Another example: the Constitution of the United States prohibits the states from enacting retroactive punishments. Suppose once again that the legislature of the state of New York decided to change the status of certain prisoners, to draw from their prior conviction certain consequences not anticipated by their judges, and to subject them to penalties that did not exist when the original crime or misdemeanor was committed. The unfortunate victims of these tyrannical measures could petition one of the courts of the Union, and that court would not fail to declare the exceptional law contrary to the Constitution of the United States and therefore null and void.

I beg the members of the Academy to observe that what is *new* is not the principle invoked by American judges but rather the use they make of it.

The idea that the constitution of a country imposes a *legal* obligation on the legislature itself is accepted in Europe as well as the United States, but in Europe there is seldom anything but the occasional revolution to indicate to high state authorities that they have violated the constitution or neglected its spirit, whereas in America, it is the judge who, whenever the executive or legislature strays from the Constitution, stops them in their tracks by refusing to grant judicial sanction to their will.

Even in England this counterweight was never used. The author wonders why the English, so nobly amorous of their liberty that they are unable to put up with arbitrariness in government even when exercised by the authorities they most love and respect, did not make use of the means on which Americans have so often relied to protect themselves from the vehemence of lawmakers. He offers an ingenious answer, which is worth mentioning: in England, he says, the nation has for centuries devoted all its efforts to combating the despotism of the prince. All the precautions that were put in place were directed against him and not against Parliament. The English were too afraid of the arbitrariness of the king to think of protecting themselves against the tyranny of the legislature. In America, where the executive is weak and the legislature is constantly cloaked in all the prestige of popular sovereignty, the law itself might often become oppressive if the courts did not have the power to purge it of any provisions that might exceed the bounds of the Constitution.

The explanation lacks neither forcefulness nor depth, but it seems to me insufficient to explain everything that the author finds surprising. Unless I am mistaken, one needs to add something else: namely, the fact that the English have no constitution in the strict sense of the word. To be sure, they accept the idea that certain general principles are beyond the reach of the legislature and no statute may violate them. But those principles are seldom set forth in a precise

way in a text that can be cited when it becomes necessary to invoke the letter of the constitution against the letter of the law. Since the limits of the constitution are not well-known, it may often be as difficult for the courts to spell them out clearly for the legislature as it is for the legislature to respect them. This explains how the English courts, which have so frequently availed themselves of interpretation to evade laws that seemed unfair or contrary to the general law of nature, have never formally refused to enforce such laws.

The avowed aim of Mr. Sedgwick's book is to show how American judges have exercised and should exercise the awesome tutelary power that their fellow citizens have vested in them. His objective is to show his country's magistrates what rules might guide them in the exercise of their power and what limits they ought to observe in a realm that might seem entirely subject to their discretion. To that end, he treats all the various subjects on which the courts have ruled to date as well as those that might arise in the future. In investigating these specific issues, as well as in setting forth the principles of the subject, he demonstrates profound knowledge of precedent, rare skill in interpretation, and, to my mind, great common sense. By delving into details with him as a guide, one can achieve a full and complete picture of this vast judicial power, which only in America dares to look democracy in the face from time to time and lay down its limits.

I have said enough to accomplish my purpose, which was to indicate the general utility of a book that might seem to deal only with certain specific points of foreign legislation. The author did not intend to write a work of political science; he confined himself to writing an excellent law book. This is the work of a lawyer, but I will allow myself to recommend it to anyone interested in public affairs.